Office-Supreme Court, U.S.
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83-718
NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. BOTTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement of Questions Involved

1. Whether there was a fatal variance between the allegations of the indictment and the evidence produced at the trial?

2. Whether the Government failed to prove specific use of the United States mails?

3. Whether the cross-examination of defendant's character witness was grossly improper?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert C. Botti, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on September 22, 1983 (Appendix A).

Opinion Below

The Court of Appeals for the Third Circuit entered a Judgment Order affirming the court below without opinion. That Judgment Order is printed in full as Appendix A.

Jurisdiction

The Judgment of the Third Circuit Court of Appeals was entered on September 22, 1983. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254 (1).

Constitutional Provisions Involved

Fifth Amendment and Sixth Amendment to the Constitution of the United States (reprinted as Appendix B).

Statutes Involved

Title 18, United States Code, Section 371; Title 18, United States Code, Section 1341; Title 26, United States Code, Section 7201. (Reprinted as Appendix C).

Statement of the Case

The Petitioner, Robert C. Botti, was indicted by a Federal Grand Jury sitting in Newark on September 23, 1982. He was charged with a conspiracy to commit mail fraud, 15 substantive counts of mail fraud and income tax evasion for two calendar years.

After trial before a United States District Judge and Jury, Botti was found guilty on all counts. He was thereafter sentenced to imprisonment for a period of 18 months on the conspiracy and all of the mail fraud counts with each sentence to run concurrently with the others. On the tax evasion counts, the imposition of sentence was suspended and Botti was placed on probation for a period

of three years to follow the custodial sentence. A timely appeal from the judgment was filed and that judgment was affirmed on September 22, 1983.

Statement of the Reasons for Granting the Writ

The Petitioner Was Denied a Fair Trial

The Petitioner was a public official at the time that he was indicted. The charges made against him did not involve his public office but dealt with his occupation as a sales representative for various entities in the maintenance supply business. During the period covered by the indictment, the Petitioner, Botti, as such a sales representative, managed to book a substantial number of orders for various items such as mops, buckets, toilet paper and the like with the Hudson County Vocational Technical School. One of the persons designated as a co-conspirator during the course of the trial was the operating official of the school and another was the owner and principal operator of the corporation represented by Botti.

During the pertinent period the purchase of janitorial and maintenance materials by the Hudson County Vocational Technical School followed a basic routine. It was proved by the Government and generally acknowledged by the Petitioner that upon notification that a shortage of supplies existed, the person in charge of the maintenance and custodial services in the school would make a request to the operating official and would then receive permission to order what was needed from the salesman when he came into the school. During that period the salesman was generally Mr. Botti. When he came to the school he would be given a list of the needs

and ultimately the material as ordered would be delivered. At about the same time the school was operating under an informal requirement that purchases of any single item of a value of more than $300.00 should be consumated only after the school has received three independent price quotations. That guideline, which was never the official policy, was established by an administrative assistant, without any instructions from any superior, in order to be on "the safe side" of $500.00 The significance of the $500.00 figure is related to a New Jersey Statute (N.J.S. 18A:18-37) which provides for several quotations to be received on any public contract which is of a value of $500.00 or more.

During the same time period, the school was in difficult financial straits and was very slow in its payments, sometimes taking as long as seven or eight months after the invoice to complete the transaction. It was well known that the school was slow in its payments and therefore it had difficulty in obtaining responsible quotations.

When the Petitioner would receive an order for the school, he would process the order and then in order to complete the paper work as required by the administrative assistant, he would supply the school with two additional quotation letters, of fictitious vendors, quoting different but higher prices on the same items.

There did not seem to be any dispute during the trial that the materials ordered were supplied in the proper quantity and quality and at competitive prices. In connection with all of the sales transactions for the years 1978 and 1979, Botti received commissions upon payment. Those commissions, which it was alleged were not reported, in his original tax returns, for the years involved, amounted to $15,501.00.

The principal issues presented to the trial jury were whether the Petitioner had participated in a scheme to defraud the Hudson County Vocational Technical School and whether he had wilfully attempted to evade the payment of federal income tax on some commissions which were earned by virtue of the scheme. The fraud was brought within the federal jurisdiction by the alleged use of the United States mail in furtherance thereof.

The indictment charged the defendant in both the conspiracy and substantive counts, which related to the fraud, with engaging in the enterprise with the intent "to defraud and obtain money, over $50,000.00, from the Hudson County Vocational Technical School by means of false and fraudulent pretenses and representations relating to price quotations submitted . . ." to the school. The Government, however, during the course of the trial proceeded on the theory that the fraud was the deprivation to the school of the intangible right to have true competitive bidding.

1. There was a fatal variance between the allegations of the indictment and the evidence produced at the trial.

The Fifth Amendment of the Constitution of the United States provides in pertinent part that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury . . ." Amendment VI of the Constitution mandates that "the accused be informed of the nature and cause of the accusation . . ." Traditionally the indictment has performed that advisory role. It has been said that an indictment, as a charging instrument has two chief purposes. The first to apprise the accused of the nature of the charges against him so that he may adequately prepare his defense. Second, to describe the crime with

which he is charged with sufficient particularity to enable him to protect against future jeopardy for the same offense. *Gaither* v. *U.S.*, 413 F.2d 1061 (D.C. Cir. 1969).

In the present case the Petitioner was not provided with adequate notice, by the indictment, of the charges against him. He went to trial with a defense geared to meet the charge of a money fraud as alleged in the indictment and instead was faced with the variant accusation that he deprived the school of its intangible right to competitive price quotations. *See U.S.* v. *Creamer*, 555 F.2d 612 (7th Cir. 1977) cert. den. 434 U.S. A.33, 98 S.Ct. 118, 54 L.Ed. 2d 93 (1977); *U.S.* v. *Rubinowitz*, 176 F.2d 732 (3rd Cir. 1949). By virtue of the language of the indictment, the Petitioner was mislead, in his defense, to his detriment.

2. The Government failed to prove specific use of the United States mails.

There can be no doubt that without the actual use of the United States mails, in furtherance of the fraud, there is no federal jurisdiction over the substantive counts charged against the Petitioner. See *United States* v. *Maze*, 414 U.S. 402, 404, 94 S.Ct. 645, 651, 38 L.Ed. 6003 (1974). A charge of mail fraud in violation of Title 18, U.S. Code Section 1341 must be based upon the ability of the Government to prove explicitly that as to each specific charge a mailing occurred. The mailing as defined in the statute is the deposit of mail in a depository for such mail matter with the intent that it be delivered to the addressee by the United States Post Office. *U.S.* v. *Tarnopol*, 561 F.2d 466 3rd Cir. 1977. There must be specific proof, as to each mail fraud count, that the item alleged to be mailed was actually sent or received through the United States Postal Service.

There was insufficient evidence presented to the court in the present case, drawing all inferences favorable to the Government, from which a reasonable jury could have determined, beyond a reasonable doubt, that any specific letter was actually handled by the United States Postal Service. The Government built its case upon the uncorroborated testimony of a single witness, to the general effect, that the quotation letters were always received through the mail, without exception. Most of the witnesses who had detailed familiarity with the transactions involved, some of whom were called by the Government, had a recollection of various occasions when the quotation letters involved here were delivered by hand. There was no clear evidence with reference to any single substantive mail fraud count that the mailing, as alleged, actually took place.

This is not the usual case where testimony as to the customary practice in an office would establish the basis for the inference beyond a reasonable doubt of mailing. See Federal Rule of Evidence 405; *Winel* v. *United States,* 365 F.2d 646, 648 (8th Cir. 1966). The witness in question testified only that she received "the letters" through the "mail". There was no effort by the prosecution at any time to establish that her meaning of the word mail involved the use of the United States Postal Service. Obviously she was in no position to testify as to the custom or practice in the sales company represented by the Petitioner.

Under the mail fraud statute the mailing must be for the purpose of executing the scheme and in furtherance of it. *Kann* v. *United States,* 323 U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944). It is agreed, however, that the scheme, once it is established, need not directly contemplate the use of the mails as an essential element *Pereira* v. *U.S.,* 347 U.S. 1, 874 S.Ct. 358, 362, 98 L.Ed. 435 (1954). The Petitioner intended that the so-called quotation letters were

not an essential part of his transactions with the school but were in essence an after act solely designed to placate the fastidious administrative assistant in the school office. It was the position of the Petitioner that he had the orders whether the quotation letters were received by the school or not. The letters, if mailed, were not in furtherance of any scheme to defraud the school.

3. The cross-examination of defendant's character witness was grossly improper.

Petitioner in his defense called witnesses for the purpose of obtaining testimony concerning his reputation in the community. One of the witnesses on direct examination volunteered that he had come to know the defendant through participation in "March of Dimes" fund raisers. On direct examination the witness was asked whether he knew Petitioner's reputation in the community for honesty and integrity, to which he responded in the affirmative. He was further asked whether he had heard the reputation of Petitioner discussed by other people and after responding to that question in the affirmative he was asked finally what the reputation of the Petitioner was and he responded "excellent." It should be underlined that the examination on direct did call for reputation and not opinion.

On cross-examination the Assistant United States Attorney dealt with the specifics of the participation by the Petitioner, Botti, in the "March of Dimes" campaign. He questioned whether the witness remembered that Botti had collected "about $650.00" in 1978 for the March of Dimes and when the witness responded that he knew that Botti had raised quite a bit, the United States Attorney said, "and these would be donations from other people, is that right?" to which the witness responded yes.

The Government attorney then propounded the following question,

> "Would it surprise you if Mr. Botti declared on his tax returns as deductions all the money he got from the other people?"

Defense counsel immediately objected and a side-bar conference was held. Counsel brought to the attention of the court the fact that the question raised an implication that there was an inappropriate or wrongful deduction on one or more of the tax returns which were the subject of the income tax charges. It should be noted that on each of the tax returns filed by the Petitioner for the years 1978 and 1979, which were the years in question, there appeared entries to support deduction for cash contributions. In the 1978 tax return the following appeared, "March of Dimes" (Chairman) $650.00. The 1979 income tax return listed the amount of $750.00 as a contribution to the "March of Dimes."

After the question was propounded, and the jury had heard it, the side-bar conference revealed that there was no evidence in the U.S. Attorney's file which would justify the implications of his question. The court, thereupon, cautioned the jury that the question was improper and told the jury to ignore the episode. Petitioner takes the position that it was impossible to expect at that point that the jury could seriously fail to be effected by that assertion. It is difficult to imagine a more egregious accusation directed toward a public official then that he would stoop so low as to divert the credit of the hard earned nickles and dimes or dollars of the citizens of his community.

The question in conflict embodied the worst elements of abuse of the cross-examination process insofar as it relates to character witnesses. It should be emphasized here

again that the testimony related to community reputation, it did not deal with the witnesses personal opinion of any facet of Mr. Botti's character.

Prior to the adoption of the Federal Rules of Evidence, the general rule concerning character evidence in the Federal Courts was that the only relevant evidence which could be introduced was the reputation in the community for the character trait in issue. See *U.S.* v. *Curtis,* 644 F.2d 263 (3rd Cir. 1981).

Rule 405, in pertinent part, provides as follows:

> "(a) *Reputation or Opinion*—in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable as to relevant specific instances of conduct . . ."

Insofar as testimony concerning reputation is concerned, it is suggested that the rules relating to cross-examination are unchanged from the rule promulgated in *Michelson* v. *U.S.,* 335 U.S. 469, 69 Sup. Ct. 213, 93 L. Ed. 168 (1948). The Supreme Court, while holding that a defendant may introduce affirmative testimony that the general estimate of his character is favorable and from that the jury may infer that he would not be likely to commit the offense with which he is charged, the prosecution may cross-examine concerning particular acts of misconduct as a means of testing the character witness' grounds of knowledge. The court did clearly underline the admonition that the target of questions directed to character witnesses on cross-examination should not be random shots or ". . . a groundless question to waft an unwarranted innuendo into the jury box." *Michelson* v. *U.S.,* supra, 335 U.S. at 481. The court

further pointed out in *Michaelson,* supra, that the whole inquiry is calculated to ascertain the general talk of people about the defendant. It is not directed toward the witness' own personal knowledge of him. The court suggested that the form of inquiry, "Have you heard?" was generally approved and the inquiry, "Do you know?" is not allowed.

We reiterate that, not only was the form of the question which was propounded to the character witness entirely improper in the light of the scope of the testimony offered, but it was also a vehicle for inserting into the case wrongfully prejudicial information which was suggested as true by the Assistant U.S. Attorney but was obviously a "random shot" without basis in fact.

Though the Petitioner had taken the witness stand in his own defense and had testified and been cross-examined at great length concerning the mail fraud charges and the income tax charges, he was never questioned concerning the tax deductions shown on his return. In fact, the Government in a Bill of Particulars furnished prior to trial had given no warning that wrongful deductions would be claimed in connection with the tax evasion counts.

In the Third Circuit Court of Appeals in *United States* v. *Curtis,* 644 F.2d 263 (3rd Cir. 1981) the court gave warning to "trial judges, prosecutors and defense attorneys" that the Evidence Rule 405(a) did not effect a merger between reputation and opinion evidence. The court further stated that a reputation witness can only be examined on matters reasonably proximate to the time of the alleged offense and likely to have been known to the relevant community at the time.

In the present case, the facts of improper tax deductions or worse, embezzlement or breach of trust, never part of the case, were brought to the attention of the jury improperly and without foundation and the substantial rights of the defendant to a fair trial were clearly affected.

CONCLUSION

For the foregoing reasons and for the reason that the Petitioner has been deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, this Court should exercise its supervisory powers over the courts of the United States and grant this Petition.

DATED: October 27, 1983

Respectfully submitted,

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APPENDIX A

Judgment Order of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5081

UNITED STATES OF AMERICA,

v.

ROBERT C. BOTTI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey

(Crim. No. 82-00297)

(Hon. H. Curtis Meanor)

Argued September 14, 1983

Before: ADAMS, HUNTER and GARTH, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, namely, that (1) the Assistant United States Attorney's

reference on cross-examination of a defense character witness to an alleged fraudulent act of the defendant, with no basis in fact, deprived the defendant of a fair trial; (2) there was a fatal variance between the allegations of the indictment and the evidence produced at the trial; (3) the court should have granted a judgment of acquittal as to the substantive mail fraud charges; and (4) the judgment should be set aside for lack of proof of mail fraud, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,
ARLIN M. ADAMS
Circuit Judge

Attest:

SALLY MRVOS
Sally Mrvos, Clerk

DATED: Sep 22 1983

Certified as a true copy and issued in lieu of a formal mandate on October 14, 1983.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX B

Constitutional Provisions Involved

Amendment V

Criminal actions—Provisions concerning—Due process of law and just compensation clauses—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due proces of law; nor shall private property be

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

Relevant Statutes Involved

Title 18 United States Code Section 371.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code Section 1341.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any

matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both

Title 26 United States Code Section 7201.

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisioned not more than 5 years, or both, together with the costs of prosecution.